U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF RNS-INC

DATE: FEB. 5, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a healthcare staffing and consultancy company, seeks an EB-2 immigrant visa to classify the Beneficiary as a member of the professions holding an advanced degree and who is employed in a Schedule A, Group I occupation, physical therapist. *See* of the Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2); section 212a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.5(a). The U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. professional nurses and physical therapists who are able, willing, qualified, and available for these occupations, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals. 20 C.F.R. § 656.5.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner had the ability to pay the wages offered to the Beneficiary and the beneficiaries of all of the Form I-140 petitions it has filed.

On appeal, the Petitioner asserts that the evidence establishes that it has the ability to pay the Beneficiary's salary.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(2)(A) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Alien Employment Certification, from DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089, in duplicate. 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

Title 20, Code of Federal Regulations, Section 656.10(d) states, in part:

(1) In applications filed under Sections 656.15 (Schedule A), 656.16 (Sheepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

(3) The notice of the filing of an Application for Alien Employment Certification must:

(i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor.

(iii) Provide the address of the appropriate Certifying Officer; and

(iv) Be provided between 30 and 180 days before filing the application.

In addition to the unique requirements for petitions filed under Schedule A, the Petitioner must also meet the requirements for all petitions seeking the requested classification. The regulation at 8 C.F.R. § 204.5(k)(2) defines an "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the petitioner must also establish its ability to pay the wage proffered to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

II. ANALYSIS

A. Ability to Pay

The sole issue addressed by the Director in his decision concerns the Petitioner's ability to pay the wage offered to the Beneficiary, as well as the beneficiaries of other Form I-140 petitions it has filed. The Petitioner indicated on the Form I-140 that it would pay the beneficiary a wage of $98,342 per year.

Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or filed after the priority date of the current petition, July 31, 2018.[1]

We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage. Here, although the Petitioner asserts on appeal that the Director did not consider evidence that it has employed the Beneficiary since January 2018 and paid her the offered salary, the record does not include evidence of her wages such as IRS Forms W-2 or copies of paychecks issued to her. Further, the Petitioner does not indicate that it employed the Beneficiary beginning from the priority date. Since it has therefore not established that it has paid the Beneficiary at least the offered wage at any time since the priority date, we will consider the submitted evidence to determine the Petitioner's ability to pay the Beneficiary as well as the beneficiaries of the additional petitions identified by the Director.

The Director's request for evidence (RFE) notified the Petitioner of its obligation to submit evidence of its ability to pay the wages of the beneficiaries of all its petitions, and requested proof of its income tax returns and audited financial statements for 2017. In his subsequent decision, the Director noted that the Petitioner's 2017 audited financial statements showed net current assets of $2,212,126 and a net income of $1,461,791,[2] amounts which he determined were insufficient to establish its ability to pay the beneficiaries of the 53 additional petitions filed since the instant petition.[3]

On appeal, while the Petitioner suggests that it may have withdrawn some of these petitions, thereby lowering its ability to pay obligation, it offers no evidence or information regarding beneficiaries for which it no longer considers itself liable to demonstrate its ability to pay. In addition, it does not refute the Director's estimate of its cumulative ability to pay obligation, but asserts without explanation that its 2017 audited financial statements prove that it has the means to pay all of the beneficiaries for which it has petitioned. As noted in the Director's decision, those financial

[1] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[2] On review of the audited financial statements, the correct figures are $2,792,073 in net current assets and $1,079,547 in net income.

[3] We note that as of the January 15, 2019, USCIS records indicate that the Petitioner has filed 90 Form I-140 petitions, several of which have been denied.

statements indicate that neither the Petitioner's net current assets not its net income is sufficient to pay the salaries of all the beneficiaries for which it retains an obligation to do so.

The Petitioner also asserts on appeal that the additional income to be generated by the healthcare workers it has petitioned for should be considered, because under *Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967), a petitioner may demonstrate its ability to pay by showing that it has a likelihood of future profit. It is correct in that under *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In this case, the Petitioner indicated on Form I-140 that it was established in 2004 and currently employs more than 100 workers. Unlike in *Sonegawa*, however, the Petitioner does not refer to evidence in the record that includes information about the growth of the Petitioner's business, its reputation in the healthcare staffing industry, or the occurrence of any uncharacteristic business expenditures or losses which might have affected its ability to pay wages. Also unlike in *Sonegawa*, the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries.

In addition, while it is recognized that an employer's expectation of profitability based on an employee's ability to generate income may be reasonable, other costs are also incurred which offset those earnings. Further, without specific detail or documentation to explain how a beneficiary's employment will significantly increase profits, we cannot assume that to be the case. A hypothesis based upon projected future earnings does not outweigh the evidence of the Petitioner's past net income and net current assets contained in the record.

Thus, assessing the totality of the circumstances in this case, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

B. Educational Requirements

Although not discussed in the Director's decision, upon review we note that the Petitioner has not established that the Beneficiary meets the minimum educational requirements for the position. The Petitioner indicated in Part H of the ETA Form 9089, Application for Permanent Employment Certification, that the position requires a Master's degree in Physical Therapy plus 60 months of experience in the job required, and that no alternate combination of education and experience is acceptable. In addition, Part E of Form ETA 9141, Application for Prevailing Wage Determination, also indicates that a master's degree in physical therapy is required for the position. Included in the record are copies of a diploma and transcripts from [redacted] which verify the Beneficiary's receipt of a Bachelor of Science degree in physical therapy in 2009.

In a request for evidence, the Director noted that this evidence did not establish that the Beneficiary met the educational requirements for the position, and requested that the Petitioner submit qualifying evidence in the form of an official academic record showing that the Beneficiary possesses either a U.S. advanced degree (or foreign equivalent), or a U.S. baccalaureate degree (or foreign equivalent) and evidence that the Beneficiary has at least five years of post-baccalaureate experience. The Petitioner's response indicated that the Beneficiary qualifies for the position based upon her Bachelor of Science degree in physical therapy, and letters from former employers which verify her five years of post-baccalaureate experience as a physical therapist.

While the regulation at 8 C.F.R. § 204.5(k)(2) states that a beneficiary may qualify for the requested immigrant visa classification through either of the types of evidence requested by the Director, the Petitioner must also establish that the Beneficiary meets its minimum requirements for the position, as specified on Form ETA 9089, as of the date of filing the petition.[4] Since the Petitioner specified that the position requires a Master's degree and five years of experience in the job offered, and that no alternative combination of education and experience was acceptable, the Beneficiary may not qualify for the position with anything less than a United States master's degree or foreign equivalent. Therefore, the Director erred in requesting alternative evidence of the Beneficiary's qualification for the position which was not included in the Petitioner's minimum requirements.

We note that the evidence includes a "Report of Evaluation of Educational Credentials" issued by the This report concludes that the Beneficiary's education "is substantially equivalent in content to the first professional physical therapy degree in the United States. The first professional degree in the U.S. is the Master's degree or higher." It further states that the "degree does satisfy the minimum number of 150 semester credits that is required for a U.S. Master's degree." The record, however, does not contain any information to support the statement that 150 semester credits is the minimum required for a Master's degree in physical therapy from accredited institutions in the United States.

In addition, we note that the evaluation conducted by indicates that it includes coursework completed by the Beneficiary at the in 2012. However, the evaluation does not indicate that the Beneficiary received a degree or diploma from Where the analysis of the beneficiary's credentials relies on "equivalence to completion of a United States baccalaureate or higher degree," the result is the "equivalent" of an advanced degree rather than a "foreign equivalent degree."[5] The provided information makes it clear that looks at an individual's coursework (which may include coursework from multiple sources), and not the individual's degree, to determine "substantial equivalence," which is a different standard.[6]

---

[4] 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (acting Reg'l Comm'r 1977).

[5] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a United States baccalaureate or higher degree.") The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

[6] We note that, according to the Electronic Database for Global Education (EDGE), the Bachelor of Arts/Science/Commerce, etc. degree in the Philippines "represents attainment of a level of education comparable to a bachelor's degree in the United States." Under the credential description section, EDGE states that the bachelor's degree

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795.

Based upon the noted deficiencies in the evidence of the Beneficiary's education, the Petitioner has not established that she meets the minimum educational requirements for the offered position.

C. Notice of Filing

As an additional ground for denial not discussed in the Director's decision, we note that the notice of filing in the record does not comply with the requirements at 20 C.F.R. § 656.10(d)(3)(iv). Specifically, the notice indicates that it was posted at the proposed employment location from July 14, 2017 through July 28, 2017. Since this petition was filed on July 31, 2017, the notice was provided less than 30 days before filing.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the wage offered to the Beneficiary because the record does not contain evidence that it has compensated her at at least that rate since the priority date. Further, the evidence of its net income and net current assets does not demonstrate its ability to pay the offered wages of the beneficiaries of all the petitions it has filed and for which it retains an obligation. In addition, beyond the decision of the Director, we note that the Petitioner submitted a noncompliant notice of filing, and did not establish that the Beneficiary met the minimum educational requirements of the offered position as of the priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of RNS-INC*, ID# 1956613 (AAO Feb. 5, 2019)

---

is "four to five years beyond the high school diploma (except Law which is an advanced degree as in the United States) with four being the most common length," but that "Architecture, Engineering, Physical Therapy and Occupational Therapy for example, require 5 years of study." EDGE further states that the Master of Arts/Sciences degree in the Philippines "represents attainment of a level of education comparable to a master's degree in the United States."